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No. 233

In the
Supreme Court of the United States

OCTOBER TERM, 1962

EDWIN A. KAAKINEN and KAAKINEN FISH COMPANY,
Petitioners,

vs.

THE PEELERS COMPANY, a Partnership, *Respondent.*

PETITIONERS' REPLY BRIEF ON PETITION FOR CERTIORARI

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THE ARGUS PRESS, SEATTLE

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FTC Complaint Charged Respondent With Unfair Methods of Competition, Acts and Practices

Petitioners asserted that if the patents here in suit actually were found to be invalid, that fact would be highly pertinent to the issues of the Federal Trade Commission proceedings in Docket No. 7887 involving The Peelers Company (Petition, p. 10 top). Respondent's brief charges petitioners with taking "some liberties" as to the parties to the FTC complaint and states categorically that

> "the existence of the allegedly unfair acts would not be affected by the validity or invalidity or infringement of any patent owned by the Peelers Co., including those here in suit." (Resp. Br., p. 17)

The highly technical nature of respondent's protest is clearly evident from examining the title and PARAGRAPH THREE of the FTC COMPLAINT, which has been printed in its entirety as Appendix A to this brief for the information of this Court.

There is no question as to the assertion of charges against the respondent here in the FTC COMPLAINT in the statements appearing in PARAGRAPH SEVEN and PARAGRAPH NINE thereof, which state in part,

> "PARAGRAPH SEVEN: The Peelers Company is now, and at all times mentioned herein has been, in competition with other individuals, partnerships, corporations and firms engaged in the manufacture, sale or lease, and distribution of shrimp processing machinery in interstate commerce, except to the extent that such competition has been hindered, lessened, restricted, restrained and eliminated by the unlawful acts and practices hereinafter alleged.
>
> "PARAGRAPH NINE: * * * The Peelers Company * * * have engaged in unfair methods of competition and unfair acts and practices in interstate and foreign commerce, * * *."

As part of such unfair methods, acts and practices the COMPLAINT stated in PARAGRAPH NINE (c),

> "The individual respondents,* * * have harassed, intimidated, and threatened suit for patent infringement against shrimp processors who purchased or leased the Skrmetta machine * * * ; have filed suit for patent infringement against purchasers, lessees, and manufacturers of the Skrmetta machine." (App. p. 8A)

The present petitioners are such a purchaser of a Skrmetta machine and the statement in the FTC COMPLAINT that "the individual respondents" filed such suits is explained by the assertion of the FTC COMPLAINT in PARAGRAPH TWO that,

> "These individual respondents, at all times mentioned herein, participated in the formation, direc-

> tion and control of the policies, practices and acts of The Peelers Company hereinafter referred to."

Respondent seeks to hide behind the partnership veil and free itself from the charges brought by the FTC on the ground stated in the footnote on page 17 of respondent's brief that,

> "Respondent is a partnership in commendam under Louisiana law and as such has legal identity apart from any partner."

The FTC COMPLAINT clearly asserts that the respondent is merely the collective tool of the individuals named as direct respondents in the FTC COMPLAINT.

Respondent's Unfair Practices Would Be Aggravated If Patents in Suit Are Invalid

The statement in respondent's brief at page 17 that,

> "the existence of the allegedly unfair acts would not be affected by the validity or invalidity or infringement of any patent owned by the Peelers Co., including those here in suit"

appears to be quite illogical.

As has been pointed out above the respondent here, its general partners and Grand Caillou Packing Company, Inc., acting in concert, have been charged with unfair acts and practices. The FTC COMPLAINT charged,

> "PARAGRAPH TEN: From 1947 to the present, Grand Caillou, in the course and conduct of its business, as aforesaid, and the individual respondents, in the course and conduct of The Peelers Company and its predecessor corporation, Peelers, Inc., as aforesaid, have agreed and combined among themselves to adopt and carry out the unfair meth-

ods of competition and unfair acts and practices hereinbefore described."

The effects of such unfair acts and practices were charged to include that,

> "Potential competitors and competitors of the individual respondents and The Peelers Company have been, or may be, hindered, restricted, or prevented from engaging in the business of manufacturing, leasing, licensing, selling, or otherwise distributing shrimp processing machinery in the United States and in foreign countries. (PARAGRAPH ELEVEN (b))

> "Inventors and potential inventors of shrimp processing machinery have been, or may be, deterred from developing, producing, manufacturing, patenting, selling, leasing, licensing, or otherwise distributing and marketing shrimp processing machinery. (PARAGRAPH ELEVEN (d))

> "The aforesaid acts and practices of the respondents have the tendency to unduly hinder competition and have injured, hindered, suppressed, lessened, or eliminated actual and potential competition, as hereinbefore alleged, and are to the prejudice and injury of the public, and constitute unfair methods of competition in commerce or unfair acts or practices in commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act." (PARAGRAPH TWELVE)

One aspect of the FTC COMPLAINT involves the patents of The Peelers Company, as has been mentioned above, including the patents here in suit. As the FTC COMPLAINT stated,

> "The Peelers Company controls patents, through direct ownership or assignment, or has patent ap-

> plications pending, on all of its shrimp processing machinery." (PARAGRAPH FIVE)

Certainly, the conduct with which The Peelers Company was charged would be more reprehensible if the patents which served as the basis for the patent infringement suits and of the harassment, intimidation and threats of patent infringement suits asserted in PARAGRAPH NINE (c) of the COMPLAINT had been improperly granted by the United States Patent Office and were invalid.

Consequently, it is respectfully submitted that the validity or invalidity of the patents here in suit would have a direct bearing on the unfair practices charge asserted in the FTC COMPLAINT, Docket No. 7887, as stated in petitioners' brief at the top of page 10.

Were the Lower Courts Confused?

In its brief at page 2, respondent charges petitioners' argument as purporting

> "to state facts * * * lacking in clarity and accuracy through omission of facts material to the issues as presented and decided below."

One of the most difficult problems in this case is to find out what actually was the true basis for the decisions below.

At the top of page 2, respondent's brief makes reference to the 52 Findings of Fact and Conclusions of Law

> "which findings and conclusions were, in all respects, upheld by the Court of Appeals."

Precisely! The Appellate Court affirmed the District Court without discussing in its opinion any of the sub-

stance of the findings of fact, except for the extremely general conclusion asserted in Fact No. 26 that,

> "The inventions of the patents in suit are primary and pioneer inventions in the art of shrimp processing."

What the nature of the "alleged inventions" were, where they were disclosed or claimed in any of the patents, or where the "invention" of one patent differed from the "invention" of each of the other patents in suit was not discussed by the Appellate Court. The Appellate Court's decision, it is submitted, really amounted to little more than a blanket affirmance of the District Court's decision.

Respondent purports at page 2 of respondent's brief to clarify the facts, but, as was true in both the District Court and the Appellate Court, respondent fails to point out any "invention" on which any of the patents is based, or the ground for asserting the validity of claims directed to any such "invention."

The confusing character of the record below is well illustrated by the reference at the bottom of page 2 of respondent's brief to Finding 47 relating to prior art patents. Both at the bottom of this page and at the first of Finding of 47, it is asserted that petitioners relied upon "some 36 prior art patents." Yet at the end of this finding are listed *55* prior art patents. Which 36 of these 55 patents did the Court understand petitioners "relied upon" generally and which with respect to *each* of the *three* patents in suit? To which of these 36 or 55 patents did the Trial Court give consideration in reaching its decision? Which of the 36 or 55 patents

did the Appellate Court consider? The only hint that such prior art patents were considered at all by the Appellate Court is the statement in its decision that,

> "Appellants rely upon many references to sustain a 'prior art' defense. Corn-huskers, rock and gravel strainers, peanut stemmers, and onion skinners are some of the other machines referenced by appellants."

Actually, petitioners were very specific in the record and in their brief as to the particular prior art patents considered to be pertinent to specific claims of each of the three patents in suit, but there was no discussion, either by the District Court or by the Appellate Court, of any of these points to give any clue as to what exactly was considered by these Courts, or what was the basis for the blanket decisions rendered by them.

Thus, it is respectfully submitted that it is not petitioners' statement of the case which is "lacking clarity," as asserted by respondent at page 2 of its brief, but rather the entire set of findings and conclusions and the opinions of the District Court and of the Appellate Court.

As to Question One Respondent's Brief Proves Commercial Machine Was Relied on by Court

In opening its discussion as to question one, respondent's brief at page 3 asserts that petitioners' assumption that the determination of invention and of infringement was based "solely on the success and operation of a commercial machine of the patent owner" is erroneous, but the following discussion in respondent's brief

disproves this assertion and corroborates petitioners' position.

In the very next paragraph at the middle of page 3 of its brief, respondent states,

> "The Court further found that these new combinations produced new functions and new results. (Finding 24; Res. App. p. 7a)"

The finding further stated,

> "the elements of these combinations are so arranged and so co-operate as to perform functionally more than the mere elimination of hand labor."

As to what combinations, what new functions, what new results, what arrangement, what cooperation, or what more performance the Court had in mind, the record is silent, but the only subject matter to which the evidence related that functioned, or reduced hand labor, was *respondent's commercial machine.*

On page 3 of the petition respondent again asserts that

> "the Court was concerned with the 'new combinations' and not with respondent's machine."

Again, what "new combinations" either the Court or the respondent may have had in mind does not appear anywhere in the record, and the only performing evidence was that of the respondent's *commercial machine.*

At the bottom of page 3, respondent's brief makes reference to the "presence of the new combinations in such machines," but it is repeated that what "new combinations" were involved or were considered by the Court was nowhere discussed, and here respondent admits that the Court did consider the *machines them-*

selves. There is *nothing* in the record to differentiate any "new combination" from respondent's *commercial machines.*

Again, at the bottom of page 3 and top of page 4, respondent's brief states that,

> "the Court found that 'shrimp peeling machines embodying these inventions' were the first to successfully effect the automatic bulk cleaning of shrimp (Finding 9; Res. App. p. 3a); that such machines have had a rapid and widespread acceptance and have virtually eliminated the inefficient and expensive hand peeling of shrimp."

Still the Court said nothing about what "inventions" it had reference to, but the findings were clearly directed to respondent's *commercial machines.* At the end of this paragraph the respondent "related" the advantages and results to the "inventions," rather than to the "machines," but there was no discussion of *any* particular invention and certainly it was the *machines as a whole* which accomplished the results.

Repeatedly on pages 4 to 7 of its brief, respondent makes reference to the "results of petitioners' machine," " functioning and results obtained from one of respondent's machines," "respondent's machines * * * were successful." There was no evidence whatever as to the particular merit of any "claimed combination," or "new combination," which was responsible for the success of the commercial machines.

Machines of Patents in Suit Were Not Successful

While on page 7 respondent asserts that the machines of the '828 patent and of the '044 patent were some-

what successful, the decision of the Appellate Court stated specifically at the bottom of page 1A of Appendix A in the Petition for Writ of Certiorari that,

> "The first successful machine came into use in the year 1949. Prior to that, from 1944, attempts to pick shrimp by machine had not been successful in eliminating hand picking."

As to the respondent's argument that the commercial machine is the machine generally illustrated in the '355 patent, this was not proven at the trial, but, on the contrary, it was proven that the commercial machine was essentially the machine shown in the later patent of The Peelers Company No. 2,778,055 which was not in suit, and the Trial Court refused to allow testimony regarding differences between the disclosure of the '355 patent and respondent's commercial machines.

Thus, it appears, as asserted in question one proposed to this Court, that actually the decisions of both the District Court and the Appellate Court were based on the success and performance of the *commercial machine* without any independent evidence of utility of unidentified alleged "new combinations," or "inventions," disclosed in the patents *apart from the commercial machine.*

"New Use" in "Shrimp Art" as Asserted in Question Two Was Basis of Lower Court Decisions

The contention of the respondent at the bottom of page 7 of its brief that the question of "new use" could not arise in this case, is clearly refuted by the reliance of the Circuit Court at the end of its original decision (Pet. App. p. 6A) on Finding of Fact No. 26, that

> "The inventions of the patents in suit are primary and pioneer inventions *in the art of shrimp processing.*" (Italics supplied)

Why was it necessary to make reference to the "art of shrimp processing" in this finding if the *use* in this environment was not heavily relied upon? The "inventions" were not otherwise identified in the opinion of the District Court, or the opinion of the Appellate Court.

Moreover, it is clear that the Appellate Court rejected the "prior art" on the ground that,

> "corn-huskers, rock and gravel strainers, peanut stemmers and onion skinners are some of the other machines referenced by appellants." (App. Court's opinion, Pet. App. p. 5A)

If the *use* was not considered to be of any significance by the Court, why did it not make a comparison of the *mechanism,* rather than simply discussing the *use?*

On page 8 respondent accuses petitioners of misstatement of the findings and of "compounding this misstatement," asserting that

> "the Court found the device, *i.e.,* the combination to be *new.*"

Neither in respondent's brief, nor in any finding of fact, nor in the District Court's opinion, nor in the Appellate Court's opinion, however, is there any statement as to *what* combination was found to be "new." At the top of page 8 respondent makes particular reference to Finding 9 as asserting "new combinations of old elements." This finding is a typical example of the vagueness of the findings which do not state what old

elements were combined into what new combinations, or *what* invention was embodied in these machines.

Parenthetically this Finding 9 makes specific reference to the first machines successfully used in the automatic bulk peeling of shrimp, *which were the commercial machines.*

At the middle of page 8 of its brief respondent makes reference to Finding 24 as mentioning "the production of new functions and new results." What were these new functions? What were these new results? The findings, opinions and record are silent on this point. The Appellate Court held in its decision at the top of page 6A of the Appendix to petitioners' brief that,

> "The evidence * * *' was summed up in the trial court's Finding of Fact No. 26: 'The inventions of the patents in suit are primary and pioneer inventions in the art of shrimp processing.' "

Thus, the *only* conclusion which can logically be drawn from the findings of fact, decision of the District Court and decision of the Appellate Court, is that the basis for the statement of "new functions and new results" was that the machines peeled *shrimp* as distinguished from peeling corn, or onions, for example. It thus appears that the Court's whole basis for the decision was on the application of respondent's commercial machine to the "art of shrimp processing."

The statement near the bottom of page 8 of respondent's brief that,

> "The standard of invention reenunciated in the *A & P* case was *applied and discussed,"* (Italics supplied)

is erroneous. The A & P standard of invention was *not applied* to the facts of the case here in issue. All the Appellate Court did was to *quote* the judicial rule from the *Pursche* case (Pet. Br., App. p. 3A), but the Appellate Court made no attempt to *apply* that rule to the facts of this case. On the contrary, the statement in the case of *The Great Atlantic & Pacific Tea Company v. Supermarket Equipment Corp.*, 340 U.S. 147, is directly applicable here that,

> "Neither court below has made any finding that old elements which made up this device perform any additional or different function in the combination than they perform out of it."

The old elements of the patents here in suit were never discussed in the Lower Courts' decisions, nor was any *particular combination* of such elements discussed, nor was any specific "additional or different function" of any particular element discussed. It therefore cannot be said that the standard of invention of the *A & P* case "was applied" to the facts of the case here in issue, but it appears that the entire premise of the Courts' decisions was the "new use" of an assembly of old parts for peeling shrimp, instead of for peeling some other food product.

Respondent Misconstrues Petitioners' Objections to Findings

At the middle of page 9 of its brief, respondent characterizes the 52 findings as "complete and detailed." Simliarly, the Appellate Court on rehearing (Pet. App. p. 8A top) stated,

> "The findings are detailed and complete in re-

> spect to prior art, time of invention, existence of competing machines and comparison of functions; in short, novelty, utility, and invention."

There is no question but what the findings are "detailed" as to the "shrimp art." See Findings 10, 11, 12, 13, 14, 15, 29, 30, 31, 32, 33, 34 and 35. Thus, of the findings thirteen, or one-quarter, of them have nothing whatever to do with the

> "prior art, time of invention, existence of competing machines and comparison of functions"

unless the decisions of the Lower Courts were based on a "new use" of the machines in the *shrimp art*, to which question two proposed in the petition relates, and which has been discussed above.

Another nine of the findings, namely, Findings 1 to 8 and 36 are mere formal recitations of pleading background, and also have no bearing on the "prior art, time of invention, existence of competing machines and comparison of functions."

Another quarter, that is thirteen, of the findings, namely, Findings 9, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28 and 43 relate directly to respondent's *commercial machine*. Since respondent states that petitioners' assumption is erroneous that the commercial machine was used as the basis for determination of "invention" in this case (see Res. Br. p. 3), it is assumed that these "detailed" findings have no bearing on the issues in this case.

Thus, at least thirty-five of the fifty-two findings are not pertinent and must be disregarded under the classification of the Appellate Court on rehearing at the

top of page 8A of the Appendix in petitioners' brief of "prior art, time of invention, existence of competing machines and comparison of functions."

The "prior art" findings are Findings 45, 47, 48, 49 and 50, and none of these findings discusses any prior art patent specifically.

As to "time of invention," apparently only Finding 16 is pertinent.

While the Appellate Court mentions "existence of competing machines" as being covered by the findings, no finding on this point is evident.

The findings on "comparison of functions" presumably are Findings 37, 38, 39, 40, 41, 42 and 43, and *all* of these findings compare the function of petitioners' machine *with the functioning of respondent's commercial machine*, and it was *this comparison* on the basis of which infringement was found. The propriety of determining infringement on the basis of respondent's commercial machine is raised in question one.

The other findings, namely, Findings 26, 44, 46 and 51, simply state conclusions, or "ultimate facts," instead of presenting the *basis* for the decision of either Court.

At the bottom of page 9 of its brief, respondent calls to the attention of the Court the "express wording" of a list of findings and petitioners heartily join in urging the Court to study these findings. It is respectfully submitted that of those listed the Court will find, as pointed out above, that Findings 9, 17, 18, 19, 22, 23, and 24 clearly relate to respondent's *commercial machine* and

not to the machines of the three patents in suit, as petitioners have repeatedly emphasized. Further, the Court will find that of those findings enumerated by respondent Findings 36, 37, 38, 39 and 44 are directed to the "shrimp art," although respondent disclaims any bearing of "new use," as raised by question two, on the issues of this case.

Finding 2 in the list is a purely formal pleading finding.

Findings 45, 48 and 50 the Court will find to be representative examples of the vague and blanket fashion in which reference is made to the prior art.

Thus, these findings, suggested by respondent for consideration by the Court, are typical examples of inadequate findings *with respect to the issues in this suit.*

Respondent Admits the Inadequacy of Findings Restricted to "Ultimate Facts" and the necessity of Findings on "Circumstantial Facts" Not Present in this Case

On page 11 of its brief respondent accuses petitioners of creating

> "the misleading impression that the quoted extract set forth at the bottom of page 24 of the petition is taken from an *Esnault-Pelterie* decision, *when in fact it is an isolated extract from a decision of the Seventh Circuit Court of Appeals.*"

It was not petitioners' intention to create any misleading impression. It is noted that respondent was not misled by petitioners' statements, and since they were understood by respondent, obviously they would be understandable to the United States Supreme Court.

At the top of page 13 and the top of page 14 of its brief respondent points out that the pronouncement by the Seventh Circuit Court upon which petitioners rely are "dicta." At the middle of page 14 of its brief respondent calls attention to the wording from the case of *United States v. Robert Esnault-Pelterie*, 303 U.S. 26. Any inference which may be drawn from this case as to the necessity of "subordinate or circumstantial findings" also, strictly is dicta. The actual holding by the Supreme Court on this point is quoted from the case of *Kelley v. Everglades Drainage District*, 319 U.S. 415 at the middle of page 25 of the petition, but this was not a patent case.

It is precisely petitioners' point that this matter of the necessity of circumstantial findings has not been authoritatively ruled upon by the Supreme Court *in a patent case* and, in fact, even a good Circuit Court case on this point could not be found.

It appears from the comments of respondent at the bottom of page 14 and top of page 15 of its brief, that it agrees with the requirement for reasonably detailed circumstantial findings of fact and if this interpretation of respondent's brief is correct it is merely necessary to apply such rule to the findings of the present case to recognize their inadequacy.

Findings of Present Case are not Sufficient to Support Conclusions

In its brief at the bottom of page 15 and top of page 16, respondent contends in point two that the findings in this particular case are adequate and that this fact

can be established "by mere inspection of the findings themselves." The danger in this case is that if the findings are merely "inspected" and it is seen that there are 52 of them, the first impression would necessarily be that certainly the findings are "detailed" and "adequate." If these findings are *studied,* however, it will be found that the details pertain to the shrimp art, to formal matters and to respondent's commercial machines, for the most part, and therefore do not relate to circumstantial or evidentiary matters which are *actually pertinent* to the issues of this case.

It is respectfully submitted that even diligent study of the findings does not reveal a proper basis on which the decisions of the District Court and of the Appellate Court can be supported or reviewed on appeal and for this reason it is strenuously contended by petitioners that they do not comply with Rule 52(a) of the Federal Rules of Civil Procedure, if this rule is interpreted as respondent admits by implication it should be at the bottom of page 14 and top of page 15.

It is therefore respectfully submitted that the Appellate Court should have remanded the case to the District Court for the making of proper findings.

The Supreme Court should grant the Petition for Certiorari

Petitioners believe most sincerely that the decisions of the District Court and of the Circuit Court of Appeals are in error and that a ruling by the United States Supreme Court on the questions presented in the petition is necessary for the guidance of that Circuit Court

and other courts considering companion cases, as well as for the general guidance of courts trying and hearing appeals on patent cases. Where there has been a miscarriage of justice, as it is believed there is in the case here, petitioners have only the recourse of seeking review by this Court to correct such injustice.

Respectfully submitted,

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